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10/044,883	10/26/2001	Michael F. Howe	1013	1236

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EXAMINER

BUSHEY, CHARLES S

ART UNIT	PAPER NUMBER
1724	

DATE MAILED: 05/02/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/044,883

Applicant(s)

HOWE, MICHAEL F.

Examiner

Scott Bushey

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-22 is/are pending in the application.
- 4a) Of the above claim(s) 13-22 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☒ Claim(s) 12 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 1 shf 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Election/Restrictions*

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
  - I. Claims 1-12, drawn to a portable foam generator, classified in class 261, subclass 72.1.
  - II. Claims 13-16, drawn to a method of foaming, classified in class 516, subclass 10.
  - III. Claims 17-22, drawn to a method of controlling pests and pest control compositions, classified in class 504, subclass 364.

The inventions are distinct, each from the other because of the following reasons:

2. Inventions II and I are related as process and apparatus for its practice. The inventions are distinct if it can be shown that either: (1) the process as claimed can be practiced by another materially different apparatus or by hand, or (2) the apparatus as claimed can be used to practice another and materially different process. (MPEP § 806.05(e)). In this case the apparatus may be employed for dispensing liquid compositions that do not incorporate a foaming agent or that are not intended to be dispensed as a foam.

3. Inventions of (Groups I and II) and Group III are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects (MPEP § 806.04, MPEP § 808.01). In the instant case the different inventions of the compositions and the methods of foaming do not require the particulars of the foaming apparatus or those set forth in the foaming method of Group II. Furthermore, the apparatus and the foaming methods of Group II do not require the particulars of the pest treating compositions. Therefore, the method for treating pests may be

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performed employing an apparatus other than that set forth in Group I or employing other than the method set forth in Group II.

4. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.

5. During a telephone conversation between Examiner D. Metzmaier and Mr. John D. Lister, attorney on November 25, 2002 a provisional election was made without traverse to prosecute the invention of Group I, claims 1-12. Affirmation of this election must be made by applicant in replying to this Office action. Claims 13-22 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

#### *Specification*

6. The disclosure is objected to because of the following informalities: 1) page 2, line 22, between "number" and "pests", --of-- should be inserted; 2) page 12, line 19, --of-- should be inserted before "the tube".

Appropriate correction is required.

#### *Claim Objections*

7. Claims 1-4, and 12 are objected to because of the following informalities: In claim 1, on the penultimate line, "the discharge of and dispensing the fluid foam" should be changed to read --the discharge and dispensing of the fluid foam--. In claims 2-4, "venturi" is misspelled and should be corrected. In claim 12, on the last line, "of foam the fluid foam" should be replaced by --of the fluid foam--. Appropriate correction is required.

***Claim Rejections - 35 USC § 102***

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

9. Claims 1, 3, 4, 7, 8, and 11 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Restive (Figs. 1 and 5; col. 6, lines 30-41, 57-67; col. 7, lines 39-49; col. 8, lines 56-67).

Applicant should note that Restive teaches providing two sets of diametrically opposed and aligned venturi openings (50) within the discharge tube, each of the openings preferably having a diameter of 0.020 inches. The total cross-sectional area of the four openings amounts to 0.001256 square inches, which when applied to applicant's range of 0.01% to 50% of the transverse cross-sectional area of the discharge tube, would meet applicant's instant claim 1 for all discharge tubes having diameters between 0.0025 inches and 12.56 inches. Wherein applicant suggests a discharge tube internal diameter of 1/8 of an inch at page 11 of the instant specification, Restive is considered to clearly anticipate the dimensional characteristics of instant claim 1.

***Claim Rejections - 35 USC § 103***

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 2 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Restive taken together with Spengler et al.

Restive (Figs. 1 and 5; col. 6, lines 30-41, 57-67; col. 7, lines 39-49; col. 8, lines 56-67) substantially discloses applicant's invention as recited by instant claims 2 and 6, except for the venturi opening being in the form of a single aperture in the discharge tube and the pressurized air inlet being below the liquid level, the air inlet including check valve means.

Spengler et al (Fig. 1 ; col. 4, lines 5-29, 67-68; col. 5, lines 1-6; col. 6, lines 38-45) disclose a foam generator similar in construction to that of Restive, wherein the venturi opening is in the form of a single aperture (64) in the discharge tube (61) and the pressurized air inlet is below the normal liquid level within the reservoir, the air inlet including check valve means (44). It would have been obvious for an artisan at the time of the invention, to reduce the number of openings in the discharge tube of Restive, to a single opening, in view of Spengler et al, since such would provide a discharge tube that would be less likely to break off at the level of the venturi openings. Furthermore, it would have been obvious for an artisan at the time of the invention, to lower the air inlet of the pressurizing pump of Restive below the level of the liquid within the reservoir, in view of Spengler et al, since such would provide a steadying influence upon the surface of the liquid, thereby reducing sloshing of the liquid during use of the device, which would reduce the occurrence of occlusion of the venturi opening with liquid, thereby providing a consistently thick foam product.

12. Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Restive taken together with Cummins.

Restive (Figs. 1 and 5; col. 6, lines 30-41, 57-67; col. 7, lines 39-49; col. 8, lines 56-67) substantially discloses applicant's invention as recited by instant claim 5, except for the weight being placed on the discharge tube.

Cummins (Figs. 1 and 2; col. 2, lines 54-59; col. 3, line 24 through col. 4, line 3) discloses a foam generator similar in construction to that of Restive, wherein a weight (36) is placed on the discharge tube. It would have been obvious for an artisan at the time of the invention, to provide the discharge tube of Restive with a weight, in view of Cummins, since such would maintain the lower end of the tube at the lowest point of the reservoir to thereby insure use of virtually all of the liquid within the reservoir during a given foaming operation.

13. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Restive taken together with Urquhart.

Restive (Figs. 1 and 5; col. 6, lines 30-41, 57-67; col. 7, lines 39-49; col. 8, lines 56-67) substantially discloses applicant's invention as recited by instant claim 9, except for the air pressuring means being in the form of a pressurized air source connected to the reservoir by an air delivery line.

Urquhart (Fig. 6; page 3, col. 1, lines 53-68) discloses a foam forming device similar to that of Restive, wherein it is disclosed that the air pressurizing means may be in the form of either a manual air pump or a source of pressurized air connected to the reservoir by air delivery line means. Wherein Urquhart clearly teaches that a manual air pump or a source of pressurized air connected to the reservoir by an air delivery line are obvious equivalents within the art, it would have been obvious for an artisan at the time of the invention, to substitute a source of

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pressurized air connected to the reservoir by an air delivery line for the hand pump means of Restive.

14. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Restive taken together with Fauci.

Restive (Figs. 1 and 5; col. 6, lines 30-41, 57-67; col. 7, lines 39-49; col. 8, lines 56-67) substantially discloses applicant's invention as recited by instant claim 10, except for the harness for carrying the device on a person's back.

Fauci (Figs. 1, 2, and 7; Abstract) disclose a foaming apparatus similar to that as taught by Restive, wherein there is provided a strap system for a person to carry the device over there shoulder. It would have been obvious for an artisan at the time of the invention, to modify the apparatus as taught by Restive to include a strap harness, in view of Fauci, since such would facilitate the carrying of a larger capacity reservoir, thereby reducing the need for refilling the device with foaming liquid.

#### *Allowable Subject Matter*

15. Claim 12 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### *Conclusion*

16. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.



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17. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Scott Bushey whose telephone number is (703) 308-3581. The examiner can normally be reached on Monday-Thursday 6:30AM-5:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David A. Simmons can be reached on (703) 308-1972. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 305-7718 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

Scott Bushey  
Primary Examiner  
Art Unit 1724

csb  
April 30, 2003

  
4-30-03